In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1051

DISTRICT COUNCIL OF PAINTERS NO. 48, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–10) is reported at 340 F. 2d 107. The Board's decision and order (Pet. App. 17–41) are reported at 144 NLRB 1523.

JURISDICTION

The decree of the court of appeals (Pet. App. 11–14) was entered on February 19, 1965. The petition for a writ of certiorari was filed on April 9, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

771-626—65

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the union induced and encouraged foremen of neutral employers to withhold services from their employers, for an object of forcing the latter to cease doing business with another employer with whom the union had a labor dispute.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2–3 of the petition.

STATEMENT

The companies involved in the present case are Hamilton Materials, Inc. ("Hamilton"), a manufacturer and supplier of drywall and acoustical materials used in the building and construction industry; Avalon Painting and Drywall Co. ("Avalon"), a painting and drywall contractor; and Reuben Casey ("Casey"), a drywall contractor (Pet. App. 28, 30; R. 5, 6, 10, 12).[1] Paint Makers Local Union No. 1232 had been engaged in a labor dispute with Hamilton, and had picketed Hamilton's premises since December 19, 1962. But, during the period here involved, neither Local 1232, nor District Council of Painters No. 48, had a labor dispute with Avalon or Casey (Pet. App. 28; R. 7, 10, 13).

In December 1962, District 48 undertook to assist Local 1232 in the latter's dispute with Hamilton

[1] "R." refers to Volume I of the record as reproduced pursuant to Rule 10 of the court below and filed with the petition. "Tr." refers to the reporter's transcript of testimony as reproduced in Volume II of the record.

(Pet. App. 31; Tr. 99–103).[2] Two business representatives of District 48, Calmer Hanson and William Seaquist, called at a construction project known as Springdale South Homes, where Avalon's employees were working (Pet. App. 31; Tr. 111–112, 114–115). Hanson told "drywall foreman" Coslett, a member of Painters Local 1817 affiliated with District 48, and Avalon's project superintendent, Forrest Windell, that the Hamilton material arriving on the job was "unfair" (Pet. App. 31; Tr. 36–38, 115, 116). Windell inquired whether District 48 was going to picket the project, and Hanson replied that he did not know and left the site (Pet. App. 32; Tr. 116).[3]

At about the same time, Hanson also followed a Hamilton truck to another construction site known as Weatherstone North, where employees of Reuben Casey were working (Pet. App. 32; Tr. 62, 63, 113, 114). Hanson introduced himself to Casey's "taping foreman," R. C. Wooten, a member of Painters Local 1817. Before the truck delivering materials supplied by Hamilton to Casey could be unloaded, Hanson told Wooten, in the presence of a Casey employee and the Hamilton truckdriver, that the material was "unfair" (Pet. App. 32; Tr. 62, 63, 113, 114). When Wooten

[2] Local 1232 is not a member of that district, but of District 36 in Los Angeles (Pet. App. 31).

[3] Two days earlier, "Johnie" Thomas, a business agent of Local 1232, had approached Coslett at the same site while Hamilton's products were being unloaded and stated that Avalon "wouldn't be able to unload the material * * * That it was unfair material, and [that] if we [Avalon] did unload the material * * * [Local 1232] would put up a picket line and we [Avalon] wouldn't be able to enter the job" (Pet. App. 18; Tr. 32–33).

asked what he was to do with it, Hanson replied that he "did not know" (Pet. App. 33; Tr. 114). Wooten instructed the driver to put the truck in a garage at the site, and stated that the material would be held until a clearance had been obtained (Pet. App. 33; Tr. 114). Hanson then sought the project superintendent and told the latter that the material arriving on the job and being unloaded was "unfair" (Pet. App. 33; Tr. 114). The project superintendent informed Hanson that he "would check into it" (Pet. App. 33; Tr. 114). The project was not picketed (Tr. 68).

The Board held that "an 'unfair' statement made directly to secondary union employees represents a direct thrust against such employees sufficient to invoke their obligation under usual union rules not to handle 'unfair' or 'non-union' material." The Board concluded that, by making such statements, District 48 through its business representative Hanson, had requested and encouraged employees of Avalon and Casey to cease performing services for their respective employers, with an object of forcing or requiring Avalon and Casey to cease doing business with Hamilton, in violation of Section 8(b)(4)(i)(B) of the Act (Pet. App. 19–20, 21). The Board ordered District 48 to cease and desist from the unfair labor practices found and to post the customary notices (Pet. App. 21–23).[4]

[4] The Board also found that Local 1232 violated Section 8(b)(4)(i) and (ii)(B) of the Act by the statement of Business Agent Thomas to Avalon foreman Coslett (n. 3, *supra*). The court below sustained this finding (Pet. App. 7–8), and it is not here challenged.

The court of appeals enforced the Board's order in full (Pet. App. 8–10).

ARGUMENT

As petitioner recognizes (Pet. 7–8), this Court held in *National Labor Relations Board* v. *Servette,* 377 U.S. 46, that Section 8(b)(4)(i)(B) of the Act proscribes attempts to induce or encourage individuals employed by neutral employers, including supervisors, "to withhold their services from their employer," but does not reach attempts to persuade managerial personnel to make a "managerial decision" to cease doing business with a disfavored employer. The only issue here is whether the Board and the court below properly concluded that the statements made by petitioner's representatives sought to induce employees of Avalon and Casey to cease working, rather than to make a managerial decision not to handle Hamilton's materials. This is essentially a factual issue, which does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491.

In any event, the conclusion of the Board and the court below that the Union sought a withholding of employment services was reasonable. The foremen whom District 48 approached were union members, and they were told that the material being delivered was "unfair." This is a traditional appeal to union loyalty rather than to managerial discretion. As the Board observed (Pet. App. 19), to advise secondary union employees, in the course of their employment, that a product is "unfair" tends to invoke "their

obligation under usual union rules not to handle 'unfair' or 'non-union' material." And, as the court below noted (Pet. App. 7), the fact that more than a management decision was intended is confirmed by the circumstance that in one instance Local 1232, upon whose behalf District 48 was acting, coupled its assertion that the material was "unfair" with an explicit threat to picket the project if its demands were not met (Pet. App. 7–8). See *Electrical Workers* v. *National Labor Relations Board,* 341 U.S. 694, 700–701; *National Labor Relations Board* v. *Local 294, Teamsters,* 298 F. 2d 105, 106–108 (C.A. 2).

There is no substance to petitioner's contention (Pet. 9–11) that the Board's decision prohibits appeals to supervisors employed by neutral employers to aid a striking union. The findings of the Board, sustained by the court below, show that petitioner did more than make such an appeal; it sought to induce the supervisors to stop working, for an illegal secondary object. The First Amendment does not protect the latter type of activity. See *Electrical Workers, supra,* 341 U.S. at 705.[5]

[5] The Board dismissed the complaint insofar as it alleged that Local 1232 violated the Act by the action of its business agent in distributing circulars explaining Local 1232's dispute with Hamilton, to a foreman at a third project, and in threatening to picket the Hamilton truck, as opposed to the entire project, if it was unloaded (Pet. App. 20, 35, 38–39).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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